78-548

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY ARROYO and
FRANK SANCHEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Anthony Arroyo and Frank Sanchez, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above case.

OPINION BELOW

The opinion of the Court of Appeals and dissenting opinion are not yet reported but both the majority and dissenting opinions are set out in the appendix. (p. 1a)

The matter was tried before a jury in the District Court and no reported opinion or decision exists.

JURISDICTIONAL STATEMENT

The judgment of the majority of the Court of Appeals was rendered on July 31, 1978. The petition for rehearing was denied on September 5, 1978, Judge Swygert voting to rehear the matter en banc. This Court has jurisdiction pursuant to Section 1254 of Title 28 of the United States Code.

QUESTION PRESENTED

Whether the trial court erred in refusing to instruct the jury that if the defendant SBA loan officer made no request or solicitation for or had any understanding or agreement to receive any gratuity until after he had exhausted his power of decision with respect to the loan and, if his decision had not been made under any prior promise or understanding that a gratuity would be paid, then defendant did not violate §201 (c)(1) of Title 18.

STATUTE INVOLVED

United States Code, Title 18, Section 201

United States Code, Title 18, Section 201

(c) Whoever, being a public official or person selected to be a public official directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being influenced to do or omit to do any act in violation of his official duty; or

•••

Shall be fined not more than $20,000.00 or three times the monetary equivalent of the thing of value, whichever is greater or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

•••

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him;•••.

Shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

Petitioner Anthony Arroyo was a loan officer with the Chicago office of the Small Business Administration while Petitioner Frank Sanchez was a loan consultant with the Community Economic Development Corporation, an entity funded to assist businesses in need of financing, especially SBA loans.

The complaining witness, Orland Fernandez Galindo ("Fernandez") operated a cash register company in Chicago, and, in 1975, through the Continental Illinois National Bank of Chicago (the City's largest bank) applied for an SBA 90% guaranteed loan. The loan was presented to the SBA on August 15, 1975 and assigned to defendant Arroyo on August 19.

Arroyo made the required field visit (to review the operation of the applicant) and, on August 26, 1975, recommended approval of the loan guarantee. He presented his recommendation to his superior, who, on the same day, concurred in the approval. This concluded Arroyo's action on the loan, which was sent to SBA legal department for completion of requisite papers.

On August 27, 1975, Fernandez was at the CEDCO office and, on that date, met Sanchez for the first time and inquired about his loan. Sanchez arranged for Fernandez to meet with Arroyo the following evening.

On August 28, 1975, Fernandez met with both Arroyo and Arroyo's teen age son for dinner. Fernandez inquired about his loan application and Arroyo advised him he "did not have any problems [because] he [Arroyo] had it." This was Fernandez' first meeting with Arroyo.

Fernandez testified [denied by Arroyo] that he asked Arroyo if it would cost him anything. In reply, Arroyo is alleged to have said "see Sanchez".

The next day, August 29, Fernandez saw Sanchez at the CEDCO office and related the discussion he had with Arroyo. Fernandez testified he asked Sanchez "how much it (the loan) was going to cost," and Sanchez allegedly stated "some of the people paid different amounts" and then "mentioned a different amount." Fernandez did not testify as to what the additional amount was, or that any agreement was made to pay any money.

Shortly thereafter, on or about September 1, 1975, Fernandez was advised that the loan had been approved and the bank disbursed the first $5,000.

Fernandez neither saw nor met either Arroyo or Sanchez after August 29, 1975, until December 1975, when he met Sanchez sometime around Christmas, at the CEDCO office. Fernandez had not gone to CEDCO specifically to see Sanchez, but met him and commented on "the way the bank was issuing money to me, that it was actually very poor quality."•

While he couldn't recall the exact question, Fernandez testified Sanchez then asked him if he had paid Arroyo. Fernandez told Sanchez, "about the problems I was having with the bank, . . . and that the money was not enough for my business." Fernandez testified Sanchez then "asked that it was convenient or better that I should pay him $800." This was the first testimony as to any dollar amount and Fernandez did not testify that he agreed to

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• Fernandez testified in Spanish with an interpreter translating the testimony to English for the jury, court, counsel and reporter. The record is the interpreter's translation.

pay that money or any other sum, either then or previously.

That was the sole contact between Fernandez and either defendant until March 1976, after Fernandez had received all of his loan proceeds from the bank. In the first part of March 1976, Fernandez visited Puerto Rico and upon his return on March 15, 1976, he called Sanchez. Fernandez did not explain why he called Sanchez. There was no message from either defendant requesting a call.

During that conversation on March 15th, Fernandez testifies Sanchez told him that the man from downtown wanted to talk to him in relation to the money, "that he wanted to collect on or that he needed the eight." Later that day, Fernandez stated he received a called from Arroyo stating "he was going to stop by on the following day at 5:00 to pick up the money."

Fernandez then went to the bank and later to the FBI. He was given $500 in marked bills and recording equipment was set up in his office. On March 16, Arroyo went to Fernandez's office, received the $500 and was arrested. The transcribed conversation is reported in the majority opinion, p. 5a. Arroyo and Sanchez were then arrested and indicted, charged with violating Section 201(c) of Title 18. (Arroyo was charged with the substantive act while both were charged with a conspiracy to violate the act.) The government chose not to proceed under 201(g) of Title 18 and the matter went to the jury solely on the question of Arroyo's guilt or innocence under 201(c).

REASONS FOR GRANTING WRIT

The majority opinion below conflicts with earlier holdings of the Fourth Circuit Court of Appeals, *Woelfel* v. *United States*, 237 F. 2d 484 (1956) and the District of Columbia Circuit Court of Appeals, *United States* v. *Brewster*, 506 F.2d 69 (1974).

In *Woelfel*, the defendant, an Engineer with the Army Ordinance Corps, was responsible for advising as to contract changes, meeting suppliers, and inspecting the work on a project converting an industrial building into an ammunitions plant. In considering a contract change in the proposed flooring, Woelfel met with the new supplier's representative. Contemporaneously with recommending the change, Woelfel requested "a token of appreciation" (a new car) from the new supplier, telling the agent, "You can raise those prices when you submit your bid to the contractor to cover it." The supplier reported Woelfel to the Ordinance Corps and he was indicted, charged with a bribery violation of the predecessor to Section 201(c). The 1962 Amendments to the bribery statutes made a "substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery [but made] no significant changes of substance . . ." (1962) U.S. Code Cong. Adm. News 3852, 3853. Thus, *Woelfel* remains a valid precedent. On Appeal, Woelfel argued that:

> "That evidence of the United States disclosed that the defendant did not ask for the gratuity until after he had made every decision and taken every action open to him in respect to the specification change, and had done so without prior promise or understanding between him and the flooring company as to what would be his decision or action.*** [and] the jury should have been instructed that if they found these to be the facts, they should acquit." 237 F.2d at 487.

The Fourth Circuit agreed, holding that:

> "[If the] request for a gratuity was not made until after he had exhausted his power of decision or action on the question or matter before him and was not made under any prior promises to understanding that a gratuity would be forthcoming, then his request did not constitute a transgression of the statute." 237 F.2d at 488.

The matter was remanded for a new trial.

The majority below holds *Woelfel* to be distinguishable, stating that the supplier in *Woelfel* knew the official act had been performed while Fernandez here was unaware of the approval of his loan request at the time of the initial solicitation.

There are several errors in this reasoning.

First, there is evidence in *Woelfel* that he made his first solicitation representing that the change order had not been concluded. (273 F.2d at 485)

More importantly, the evidence is not so clear or convincing that it must be assumed here that the jury concluded Fernandez was solicitated at a time he remained unaware his loan had received SBA approval. The majority opinion requires an interpretation of the August 28, 1975 meeting between Fernandez and Arroyo as being a solicitation by or offer of money to Arroyo. Of course, Arroyo denied the solicitation. Under the instructions given (and those denied) by the Court to the jury, the jury may not have accepted or believed that part of Fernandez's relation of the events of August 28 yet still have returned the guilty finding. Only if the tendered instructions were given would the jury have been properly advised as to the requirement that the solicitation or agreement for a bribe must precede the act's completion. The

jury was not instructed that it had to find Fernandez was deceived and such may not be presumed.

Without the instruction based on *Woelfel,* the defendants' argument to the jury was substantially handicapped and severely limited. The weakness and vagueness of Fernandez's testimony as to the August conversations with defendants could not be highlighted, since the instructions given to jury did not require that the jury accept Fernandez's testimony in toto. There is evidence that Fernandez knew his loan had been approved no later than September 1 or 2.

The importance of *Woelfel* instruction is explained by the Woelfel court:

> "[T]he defendant was entitled to have the jury instructed on the legal effect of his contention for the evidence—that if they believed that the request was not made by the accused until after he had exhausted his power of decision or action on the question or matter before him, and was not made under any prior promise or understanding that a gratuity would be forthcoming, then his request did not constitute a transgression of the statute. This is a sound construction of the act and the District Judge should have so charged the jury." 237 F.2d at 488.

Here, the evidence is without contradiction that Arroyo "had exhausted his power of decision," prior to his first meeting with Fernandez. Defendants, as *Woelfel,* were entitled to have their interpretation or contention for the evidence submitted to the jury.

The majority attempt to distinguish this by interpreting the evidence and testimony to be that at the meeting of August 28, two days after Arroyo approved the loan application, Arroyo created a false impression in Fernandez's mind. This is found in Fernandez's testimony that Arroyo

told him several times that Fernandez "did not have to worry because he [Arroyo] already had it." This was a true statement, but the majority holds that the jury accepted it as misrepresentation which led to a bribery situation.

The majority acknowledge that 201(c)(1) proscribes taking anything "in return for: being influenced in his performance of any official act;" but emphasizes the phrase "in return for" as broadening the meaning of "being influenced" so that 201(c) covers acts concluded as well as acts to be done. In so construing the statute, the majority acknowledge that "more thorough draftsmanship might have added 'or apparently being' after being." Defendants submit that this construction of the act does require that redrafting and defendants need cite no authority that is not for the Courts to add language to a statute to cover an omission.

Further, as the dissenting opinion points out, the bribery statute is "to prevent official decisions made as the result of corrupt influence." Where the official has acted and performed according to procedure and without taint, then the governmental process is protected and, while wrong, a post action acceptance of a gratuity is clearly covered by 201(g) and is not a violation of 201(c).

In footnote 10 (p. 11a) the majority attempts to rebut the dissenting viewpoint by stating that, "The distinction between §201(c)(1) and §201(g) lies in *what* is solicited, the former solicitation of bribes, the latter prohibiting solicitation of gratuities." With all due respect to the majority, this defined distinction has no meaning. It cannot be applied. What is the difference between a bribe and a gratuity? The difference between them is the time they are given, solicited or agreed upon. A bribe is given before

the act, to influence the performance of the act. A gratuity is given after the act has been performed, an acknowledgment (gratuity) for an act done satisfactorily or with good results. If, as the majority asserts, the difference in (c) and (g) is in what is solicited, then the corrupt governmental employee could assure avoidance of the 201(c) penalty by stating he solicits a gratuity, and not a bribe. The true distinction between §201(c) and §201(g) lies in the timing. As the dissenting opinion states, §201(c) is to preserve the integrity of the decision making process by sanctioning conduct which would corrupt it. Section 201(g) is to preserve the confidence of the citizenry in their officials and to proscribe receipt of money other than the established salary.

The legislative history to Section 201 of Title 18 is reported in (1962) U.S. Code. Cong. & Ad. News 3852, 3856. The majority cites this history (cited initially to the Court by defendants in their reply brief, *not* by the United States) and rests on the definition of official act for support of its position. If *Woelfel,* holding that the bribe had to precede the official act, were wrong or not the intent of Congress, then one might expect it would be noted in the Congressional commentary.

The distinction between subsections (c) and (g) cannot lie in the phrase official duty, as (g) refers to "official act." The difference in (c) and (g) can only lie in the timing, as held by the *Brewster* and *Woelfel* courts.

The majority states that the jury found the requisite corrupt intent for a (c) conviction and that this finding was not contested by defendants. This is not true. Defendants have always insisted that since the jury was not given the proper instructions, the corrupt intent should not be presumed. Contrary to the majority's statement,

defendants do not so concede that the jury correctly found corrupt intent. The argument has always been, since the decision on the loan was made properly, there can be no corrupt intent.

The differences between the intent and liability of the donor and that of the recipient is demonstrated by the two opinions of the District of Columbia Circuit Court of Appeals in *U.S.* v. *Brewster,* 506 F.2d 62 (1974) and its companion case, *U.S.* v. *Anderson,* 509 F.2d 312 (1974) cert. den. 420 U.S. 991.

Brewster, a United States Senator, held an important post in the Senate and had power to influence postal rate legislation. Anderson was an agent for a major mail order house which held an interest in such postal rate legislation as it affected its mail order business.

Anderson and Brewster were jointly indicted and tried before the same jury charged with violation of Section 201(b) and (c) respectfully, for three events:

1) A payment to Brewster of $5,000 in January, 1967;
2) A payment to Brewster of $4,500 on April 27, 1967;
3) A payment to Brewster of $5,000 on July 19, 1967.

The government charged the payments were to influence Brewster's action or vote on postal rate legislation, which was introduced in the Senate on April 5, 1967.

The facts are reported in the District of Columbia Circuit Court opinion in *Brewster:*

> "The events which became the subject matter of the three courts on which defendant Brewster was ultimately convicted began in January 1967. Anderson met with Brewster and Sullivan in the Senator's office, at which time Anderson explained his representation of Spiegel, Inc., its opposition to higher postal rates,

> and its interest in seeing the proposed increase defeated when introduced. After laying out his and Spiegel, Inc.'s interest in these legislative matters. Anderson gave Brewster an envelope containing $5,000 in cash, which the Senator handed over to Sullivan. The $5,000 in cash was placed in a safe in Sullivan's office next door to the Senator's, and the funds were later used to meet miscellaneous expenditures which defendant Brewster wanted paid in cash.
>
> The anticipated postal rate increase legislation was introduced on 5 April 1967. On or about 27 April 1967 Anderson, accompanied by a man introduced as Morris Spiegel, saw defendant Brewster and Sullivan in the Senator's office. After discussion of the postal rate legislation and the tactics to defeat the rate increase as applied to Spiegel's mail order catalog business, the purported Mr. Spiegel handed an envelope containing $4,500 in cash to defendant Brewster, who later instructed Sullivan to have the funds deposited in the D.C. Committee account. On 28 April, the day after the deposit, Brewster requested $3,000 in cash, and Sullivan drew a check on the D.C. Committee account and gave the $3,000 to Brewster, who deposited it in his personal account.***
>
> On 19 July 1967 Anderson gave Sullivan his personal check for $5,000, with the payee line blank. Sullivan wrote in the name of the D.C. Committee. The evidence showed that Anderson made this personal check because while Sullivan at defendant Brewster's direction had been entreating Anderson for further funds from Spiegel, Inc., no Spiegel check had yet arrived in Brewster's office. Immediately following the 20 July deposit of the $5,000 Anderson check, at Brewster's direction four checks totaling $5,000 were drawn on the D.C. Committee account, and defendant Brewster received $3,000 of the proceeds." 506 F.2d at 66.

The jury was instructed as to Anderson under §201(b) and, as to Brewster, under §201(c) and, as a lesser included

offense, §201(g). The jury returned a §201(b) guilty finding as to Anderson, which was affirmed on appeal. As to Brewster, the jury acquitted him of the §201(c) bribery charge but found him guilty of the lesser offense, §201(g). On appeal, Brewster's conviction was reversed because of faulty instruction and the matter was remanded for a new trial, with the charges limited to a §201(g) violation.

The reversal was based on inadequacy of instructions as to the distinction between (c) and (g) and between (g) and non-proscribed conduct.

The trial court's instructions as to §201(c), which were not criticized by the Court of Appeals, included the charge that the jury "must find that the money was received by the defendant . . . with his knowledge of, in return for being influenced *in the future* in his performance of official acts." 506 F.2d at 80. This is and has been defendants' contention here.

Even more important is the *Brewster* opinions's definition of corruptly as it appears in §201(c). The Court of Appeals stated:

> "We have laid emphasis under the bribery section on 'corruptly . . . in return for being influenced' as defining the requisite intent, incorporating a concept of the bribe being the prime mover or producer of the official act." 506 F.2d at 82.

Since it is accepted even by the majority below that Arroyo had exhausted his power and authority over the Fernandez loan application, even if the August 28 discussion was as interpreted by the majority, there can be no linkage of the payment by Fernandez to the official act performed by Arroyo. The payment was not the "prime mover or producer of the official act."

The opinion of the majority below conflicts most significantly with the Fourth Circuit decision in *Woelfel* and in the District of Columbia Circuit in *Brewster*. There now exist two federal bribery laws, that in the Seventh Circuit and that in the Fourth and D. C. Circuits. A U.S. Senator can receive $5,000 prior to introduction of the legislation, receive $9,500 subsequently, and be charged under §201(g). Defendants' jury here was not only given no (g) alternative, but was not given the *Brewster* (c) instruction.

Perhaps this Court will agree with the Seventh Circuit. Perhaps *Woelfel* is wrong. Perhaps the District of Columbia Circuit is wrong. However, the federal bribery laws should be applied uniformly throughout the United States, in all ten circuits. We should have one bribery standard, applicable to all Federal employees and elected officials.

CONCLUSION

Therefore, we respectfully pray that this Court issue a Writ of Certiorari to the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2257

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY ARROYO and FRANK SANCHEZ,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 353
JOHN F. GRADY, *Judge.*
ARGUED APRIL 24, 1978—DECIDED JULY 31, 1978

Before SWYGERT and CUMMINGS, *Circuit Judges,* and MARKEY, *Chief Judge.*•

MARKEY, *Chief Judge.* The jury found Arroyo and Sanchez guilty of conspiracy to corruptly solicit a bribe in violation of 18 U.S.C § 371 (1976) and Arroyo guilty of the substantive offense—the acts of corruptly soliciting and receiving the bribe in violation of 18 U.S.C. § 201(c)

• Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals is sitting by designation.

(1) (1976).[1] Motions for acquittal and a requested instruction were based on the view that § 201(c)(1) must be limited to soliciting a bribe before the accused public official has performed the "official act"[2] intended to be influenced. The district court denied the motions and refused the request.[3] We affirm.

---

[1] 18 U.S.C. § 201(c)(1) (1976) provides:

"§ 201. Bribery of public officials and witnesses

• • • •

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act;

• • • •

"Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

[2] The term "official act" is defined in 18 U.S.C. § 201(a) (1976):

" 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, *which may at any time be pending,* or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." [Emphasis added.]

[3] The district court's judgment is unreported. Arroyo was sentenced to eighteen months imprisonment on each count, with the sentences to run concurrently. Sanchez was sentenced to fifteen months imprisonment on the conspiracy count.

Background

In May of 1975, complaining witness Orlando Fernandez Galindo (Fernandez), a native of Cuba who came to this country in 1968, applied for a United States Small Business Administration (SBA) guaranteed loan. Fernandez went first to the Chicago Economic Development Corporation (CEDCO), funded in part by the federal Model Cities Program and functioning to assist small businessmen in obtaining SBA guaranteed loans through local banks. CEDCO prepared a loan package for Fernandez and submitted it to the First National Bank of Chicago, which then applied to SBA for a 90% guarantee. The loan was an economic opportunity loan—a special type for economically disadvantaged individuals.

On August 19, 1975, Arroyo—a loan officer with SBA[4]—received the Fernandez application, for review of its credit worthiness and presentation to his supervisor, who relied upon Arroyo's recommendations in determining whether an applicant should receive a guaranteed loan. The loan received SBA authorization on August 26, 1975, but Fernandez was not told of that until later.

On August 27, 1975, Fernandez went to see Sanchez, a business counselor at CEDCO, who told Fernandez the bank had approved the loan, but that there would be no money until SBA authorization was received. Sanchez said the only person who could help Fernandez was Arroyo, and arranged for Fernandez to dine with Arroyo the next day.

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[4] It is not disputed here that the SBA is a "department, agency or branch" of the United States Government, or that Arroyo was a "public official" within the definition of that term in 18 U.S.C. § 201(a), or that Sanchez was a conspirator.

On August 28, 1975, Fernandez went to CEDCO to meet Arroyo. Sanchez told Fernandez to pick up Arroyo at his home, giving him the address. Fernandez picked up Arroyo and Arroyo's son, and the three dined at a restaurant. Arroyo and Fernandez discussed the loan application. When Fernandez asked about the delay, Arroyo repeated several times that Fernandez "did not have any problems" because "he [Arroyo] had it [the loan application]." When Fernandez asked if it would cost him anything, Arroyo told him to see Sanchez the next day.

On August 29, 1975, Fernandez went to CEDCO and related to Sanchez the previous night's conversation. When Sanchez asked Fernandez the amount of the loan, Fernandez replied "$35,000." When Fernandez asked how much it would cost, Sanchez said "some of the people had paid different amounts." Sanchez then mentioned to Fernandez "a different amount."

About two or three days later (i.e., on August 31 or September 1), the bank told Fernandez that the SBA had authorized only $5,000. Prior to Christmas, 1975, Fernandez met Sanchez at CEDCO, and Sanchez asked him if he had paid Arroyo $800. When Fernandez replied that he had not because of problems in getting the loan proceeds, Sanchez indicated that things would be "convenient or better" if Fernandez paid the $800.

SBA records indicated a January 8, 1976, disbursement of $20,000 and a February 10, 1976, disbursement of $10,000 to Fernandez.

On March 15, 1976, Fernandez returned from a trip to Puerto Rico and spoke with Sanchez, who told him Arroyo wanted to speak with him about "the money" and to collect "the eight." Immediately thereafter, Arroyo called Fernandez and said he was going to stop by the next day about 5:00 p.m., "to pick up the money." Fernandez reported the situation to the Federal Bureau of Investigation (FBI).

On March 16, 1976, FBI agents installed sound recording equipment at Fernandez' place of business, gave Fernandez $500 in marked bills and waited for Arroyo. About five minutes before Arroyo arrived, Sanchez called Fernandez and said Arroyo was on his way. Arroyo arrived between 5:00 p.m. and 5:30 p.m. Before Fernandez gave Arroyo the $500, a conversation occurred:

> "Fernandez: How much do I have to give you?
> Arroyo: Well, whatever you told me.
> Fernandez: How much was that?
> Arroyo: 800."

Acknowledging that $800 was the agreed figure, Fernandez said he could pay only $500 because of business problems and this discussion ensued:

> "Fernandez: I have had a million problems here. Well, you know how it is. It is so bad, that you are going to have, you're going to have to approve another loan of 35,000 pesos for me.
> Arroyo: Sure.
> • • • •
> Fernandez: How much does people pay up to for around 35,000 pesos?
> Arroyo: It depends on the case my brother, or how much difficulty one has. • • • You must understand, there isn't, there is no fixed rate, besides you were the one who set the rate.
> Fernandez: Yes, no, listen, that • • • it wasn't me! He set it, Frank [Sanchez] did. No, you must understand how it was.
> Arroyo: I don't know. I know only what you told me.
> Fernandez: Yes."

Fernandez thanked Arroyo for his work on the loan. Arroyo said that if Fernandez wanted additional money, he should see Sanchez and have him prepare another application, because there was an excess of funds at the end of the fiscal year.

Fernandez gave Arroyo the $500 and Arroyo put the money in his coat pocket. As Arroyo was leaving, Special Agent Gregorio Rodriguez of the FBI arrested him.[5]

SBA records indicated that Fernandez was unable to repay the loan and in May, 1977, the SBA purchased it from the bank.

The District Court's Jury Instruction

The material portions of the jury charge are:

> "As used in this section [§ 201(c)(1)], the term 'official act' means any decision or act or any question, matter, cause, suit, proceeding or controversy which may at any time be pending or which may, by law, be brought before any public official in his official capacity or in his place of trust or profit."
>
> • • • •
>
> "In order for the crime of bribery to be committed, it is not necessary that the public official actually have the power to perform the act that he promises in return for the money. What is necessary is that the public official solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act."
>
> • • • •
>
> "[T]he government must prove beyond a reasonable doubt each of the following elements: One, that the defendant Anthony Arroyo was during the time charged in the indictment a public official as defined in the law; namely, a loan officer of the United States Small Business Administration.
>
> "Two, that the defendant Anthony Arroyo did corruptly ask, demand, exact, solicit, seek, accept, receive and agree to receive money from Orlando Fernandez.

[5] Rodriquez testified that: "Mr. Arroyo stated to me that he knew what he was being arrested for and that what he had done was against the law."

> And that three, that the defendant Anthony Arroyo represented or caused to be represented to Orlando Fernandez that this money was in return for Anthony Arroyo's being influenced in his performance of an official act, as that term has previously been defined."

The Defendants' Requested Jury Instruction

The district court refused this requested instruction, which paraphrases the language of the court in *Woelfel* v. *United States,* 237 F.2d 484, 488 (4th Cir. 1956):

> "If you believe that the defendants' requests for or solicitations of the gratuity were not made until after the employee had exhausted his power of decision or action in connection with the loan and were not made under any prior promise or understanding that a gratuity would be forthcoming, then the defendants' actions did not constitute a transgression and you must find them not guilty."

Appellants' Contentions

Arroyo and Sanchez contend that it is not a violation of 18 U.S.C. § 201(c)(1), *supra* note 1, to solicit or accept money when the solicitation activity commenced after the public official had completely performed his official action. They quote from *Woelfel* v. *United States, supra:*

> "However, the defendant was entitled to have the jury instructed on the legal effect of his contention for the evidence—that if they believed that the request for a gratuity was not made by the accused until after he had exhausted his power of decision or action on the question or matter before him, and was not made under any prior promise or understanding that a gratuity would be forthcoming, then his request did not constitute a transgression of the statute. This is a sound construction of the act and the District Judge should have so charged the jury. While such a solicitation would be contemptible, it would not be indict-

able, for it would not be possible for prior 'decision or action' of an employee to be affected by later, unanticipated gifts, however, rewarding they might be." [237 F.2d at 488.]

Further, Arroyo and Sanchez assert that Arroyo may have solicited a gratuity, in violation of 18 U.S.C. § 201(g) (1976),[6] but not a bribe, in violation of § 201(c)(1), quoting from *United States* v. *Brewster*, 506 F.2d 62, 68 (D.C. Cir. 1974):

> "3. The bribery section (c)(1) prohibits the receipt of anything of value 'in return for: (1) being influenced in his performance of any official act,' while the gratuity section (g) prohibits the receipt of anything of value 'for or because of any official act performed or to be performed by him.'" • • •
>
> "4. The gratuity section (g), unlike the bribery section (c), applies to past official acts as well as future ones. • • •"

Issue

Whether the district court erred, in denying the motions for acquittal and refusing the requested instructions, turns on the underlying question of whether § 201(c)(1) is applicable only to bribery solications occurring before actual performance of the official act intended to be influenced.

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[6] 18 U.S.C. § 201(g) (1976) provides:

> "(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; • • • •
>
> "Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

OPINION

We hold that the district court did not err. Further, we hold that the jury instruction given by the district court accurately stated the law. Section 201(c)(1) cannot be limited in every case to bribery solicitations occurring before actual performance of the official act without destroying the intent of the statute.[7]

Arroyo and Sanchez' contentions, if accepted, would encourage the very conduct Congress condemned. Under the proffered interpretation, a public official could hurriedly and surreptitiously perform his official act, and then corruptly solicit and encourage the bribe, by creating the impression in the potential briber's mind that his official act had not yet been taken.[8]

That is what Arroyo did here. Dealing with a loan program for the economically disadvantaged, Arroyo approved Fernandez' credit worthiness without ever talking with him about the loan and within a few days of receiving the loan application. The loan was authorized on August 26, 1975. Yet on August 28, 1975, when Fernandez asked about the delay of the loan, Arroyo expressly and falsely represented that "he had it," creating the false impression that the application was still pending before him. Fernandez, an unsophisticated immigrant to our

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[7] Section 201(c)(1) has been held "applicable to a situation where the advice and recommendation of the Government employee involved would be influenced • • • even though the employee did not have the authority to make the final decision." *United States* v. *Heffler*, 402 F.2d 924, 926 (3d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969), quoting from *Krogmann* v. *United States*, 225 F.2d 220, 225 (6th Cir. 1955) (prosecution for offering a bribe).

[8] The solicitation here began within about 24 hours (Sanchez) or 48 hours (Arroyo) after the undisclosed performance of Arroyo's official act. As discussed in the text, the test is not whether the official act was actually performed one day or one minute before or after the solicitation, but whether the solicitation was corrupt.

shores, and seeking to enter the economic mainstream as a small business entrepreneur, could have gained no other impression. Indeed, the most sophisticated native-born could have gained no other. Then, when Fernandez asked if it would "cost" him. Arroyo did not say, "No, of course not. You are dealing with the United States Government and we don't do things that way," or words to that effect. Arroyo said, "See Sanchez." The return-for-being-influenced element of the offense was correctly stated by the district court in its jury charge: "that the defendant Anthony Arroyo represented or caused to be represented to Orlando Fernandez that this money was in return for Anthony Arroyo's being influenced in his performance of an official act, as that term has previously been defined."

The operative language of § 201(c)(1) is "[w]hoever being a public official • • • corruptly • • • solicits • • • anything of value for himself • • • in return for • • • being influenced in his performance of any official act." "Official act" is defined in § 201(a), *supra* note 2, as "any • • • action • • • which may *at any time* be pending • • • before any public official, in his official capacity • • •." (Emphasis added.) Congress having used broad language in these provisions, we find no intent to limit their coverage to future acts.[9] Congress did not intend

[9] The dissenting opinion correctly states that criminal statutes must be strictly interpreted. To hold, however, that 201(c)(1) is applicable when the bribe solicitor has hidden the fact that official action is no longer pending does not expand that section beyond its literal meaning. Reading, as we must, the § 201(a) definition of "official act" into § 201(c)(1), as indicated in the text, makes § 201(c)(1) applicable to every public official who corruptly solicits anything of value in return for being influenced in his performance of any action which may *at any time* be pending. The mere presence of the word "performed" in § 201(g) cannot be viewed as so limiting § 201(c)(1) as to immunize from prosecution thereunder the corrupt solicitation of payment for what everyone but the solicitor believes to be a bribe.

for a public official, who had solicited and encouraged a bribe with a false representation that the official act was *in futuro*, to escape liability for bribe-solicitation by proving that he had successfully hidden the truth of past performance from the bribe-payer.

Arroyo and Sanchez seize upon the words "being influenced" as indicating that § 201(c)(1) requires that the bribe be paid to influence a future act, arguing that one cannot be influenced to do what has already been done. The argument is without merit in this case, for it disregards the lead-in phrase "in return for." That phrase brings into play the purpose of the bribe and thus the mind of the bribe-payer. Though more careful draftsmanship might have added "or apparently being" after "being," the section prohibits solicitation of payment "in return for being influenced." As illustrated by § 201(c). the gravamen of the offense lies in the corrupt solicitation, which would fail if the solicitee were told the truth.[10] Bribes are paid, and solicited, in exchange for

[10] The dissenting opinion states that "a bribery statute is designed to prevent official decisions made as the result of corrupt influence." We view the statute as designed to prevent corrupt solicitation by government officials. The distinction between § 201(c)(1) and § 201(g) lies in *what* is solicited, the former prohibiting solicitation of bribes, the latter prohibiting solicitation of gratuities. Whether the solicitation succeed or fail, and whether the official act had been secretly performed, cannot change what was solicited. The dissenting opinion appears to recognize that whether the official act could be influenced is irrelevant in prosecution of a bribe payer under § 201(b), i.e., that Fernandez (had he not reported to the FBI) could have been prosecuted for paying the bribe sought here, but then suggests that Arroyo could not be prosecuted under § 201(c)(1) for soliciting the same bribe. The view that § 201(c)(1) merely seeks to shield *decisions resulting* from influence, would appear to create an absolute defense for an official, who solicits a bribe before he acts, but who can prove his decision was not influenced because he would have made the same decision in any event,

what the payer believes he is paying for. The bribe solicitor will always create the impression that the action sought is yet to come and is contingent on the bribe. The solicitation, against which the section is directed, is the same, whether the yet-to-come impression be objectively true or false. Further, § 201(c)(1), in listing one of the "in return for" elements, speaks of *"being"* influenced *in* his performance of any official act" (emphasis added). It does not speak of "being influenced *to* perform any official act."[11]

The broad language of the statute, and the purpose it was designed to accomplish,[12] preclude the

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[10] (Continued)
for the official whose bribe solicitation was refused and whose decision favorable to the solicitee could not then have been influenced, and for the soliciting official who (unknown to the briber) has no authority whatever to decide, and does not in fact decide, anything in the premises.

[11] If the focus be on the sole fact that the official act has already been performed, it is impossible on that ground alone to distinguish § 201(c(1) from § 201(g), which encompasses solicitation "for or because of any official act • • • to be performed." Distinctions between § 201(c) and § 201(g) appear in the differing language employed by the Congress. The latter section includes "otherwise than as provided by law for the proper discharge of official duty" and "for or because of any official act performed or to be performed by him." The former includes "for himself or for any other person or entity" and, of primary importance, the word "corruptly" (see discussion re *Brewster* in text, *infra*).

[12] In *United States* v. *Troop*, 235 F.2d 123 (7th Cir. 1956), involving the parallel provision which prohibits *offering* bribes (now § 201(b))), this court quoted with approval from *Kemler* v. *United States*, 133 F.2d 235, 238 (1st Cir. 1942):

> "The clear purpose of the statute is to protect the public from the evil consequences of corruption in the public service. Thus the gravaman of the offense described therein is the giving or offering of a bribe to a person acting on behalf of the United States

narrow construction sought by Arroyo and Sanchez.[13]

Arroyo and Sanchez' reliance on *Woelfel* v. *United States, supra,* is misplaced.[14] Unlike Fernandez here, the person solicited by Woelfel knew of the performance of the official act (a change order in a government contract) at the time of Woelfel's initial solicitation.

Unlike the situation before us, there was no false representation by the government official in *Woelfel* that he

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[12] (Continued)
> for the purpose of influencing official conduct. Obviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which the statute is designed to prevent, it can make no difference if after the act is done the doer discovers that for some reason or another, be it a mistake on his part or mistake on the part of some officer or agency of the United States, there was actually no occasion for him to have done it." [235 F.2d at 125.]

The "consequences of corruption in the public service" are equally evil where, as here, the public *official* solicits the bribe and the bribe solicitee believes the public official is being influenced.

[13] Arroyo and Sanchez cite no legislative history supporting a narrow construction and we have found none. On the contrary, when the present statute was enacted in 1962 (Act of October 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119), the section-by-section analysis in the Senate Report stated: "The term 'official act' is defined to include *any* decision or action *taken* by a public official in his capacity as such." (Emphasis added.) S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* (1962) U.S. Code Cong. & Ad. News 3852, 3856. Thus, we perceive no intent by Congress to exclude past acts from the definition of "official act."

[14] *Woelfel* involved 18 U.S.C. § 202 (1952). When the present section, § 201(c)(1), was enacted in 1962, the word "corruptly" was inserted. See *United States* v. *Isa*, 452 F.2d 723, 725 (7th Cir. 1971).

"had" the matter still in his control, and no belief on the part of the potential bribe-payer that he was being solicited in return for Woelfel's being influenced to do a future act. Hence *Woelfel* is distinguishable on its facts. Further, the distinction highlights the misrepresentation element. The bribe-solicitee in *Woelfel,* Potter, gave Woelfel "no answer." Nor is that reaction surprising. Potter knew that the official act had been performed, and that anything he gave "later on" would necessarily be a gratuity. The solicitation in *Woelfel* was clearly for a gratuity, which Potter could safely ignore. The solicitation in the case before us was clearly for a bribe, i.e., "for being influenced in his performance," which Fernandez was led to believe he could ignore only at peril to his loan. When the official act has actually been performed at the time of the solicitation, the distinction between the facts of this case and those of *Woelfel,* and the distinction between § 201(c)(1) and § 201(g) as well, lies in the nature of the solicitation. Here it was corrupt, as the jury found. In *Woelfel,* it was not. The difference lies in the understanding of Fernandez, created by Sanchez and Arroyo, that the act was yet to be performed, and the understanding of Potter, created by Woelfel, that the act had been performed. The opinion states:

> "The prosecution's case begins in December, 1954, with a proposal initiated by the officer in charge to amend the prime contract so as to substitute wood block flooring for the resilient floor covering originally specified. He directed Woelfel to ascertain the cost of a wood replacement and in this way Woelfel met the representatives, including one Potter, of a wood flooring company of Georgia. On January 3, 1955 Potter brought samples of his employer's product to Charlotte and discussed them with Woelfel. Satisfied that the wood blocks should make a more serviceable flooring and mean a substantial monetary saving, the officer in charge ordered the defendant to write the Corps of Engineers recommending the change. This Woelfel did on January

> 5 and promptly the change was accepted by the Engineer Corps. A chronicle of the defendant's subsequent behavior gives in narrow focus the Government's case.
>
> "January 7—*Woelfel by telephone informed Potter, at his residence in Atlanta, that apparently the specification would be changed to wood block flooring,* and when Potter commented, "That's fine,' Woelfel said, 'Yes, but I want something more than "that's fine" later on. Do you know what I mean?' Potter gave him no answer." [237 F.2d at 485-86, emphasis added.]

Arroyo and Sanchez' reliance on *United States* v. *Brewster, supra,* is equally misplaced. First, the portion of the opinion they quoted (and quoted above) is part of defendant Brewster's *argument* to the appellate court. Second, the court did not say in its opinion that it "accepted and agreed with this distinction" as Arroyo and Sanchez maintain. Third, and most significant, *Brewster* did not involve a misrepresentation that a past official act was *in futuro.* Arroyo and Sanchez' attempt to take the quoted portion of the *Brewster* opinion out of context, and to apply it to a different set of facts, must fail.

The opinion in *Brewster* did, however, set forth the many distinctions between § 201(c)(1) and § 201(g), pointing out that the primary distinction lies in the requisite degree of criminal intent (506 F.2d at 71):

> "The requisite intent to constitute accepting a bribe is to accept a thing of value 'corruptly' under section (c)(1); the comparable intent under the gratuity section (g) is to accept a thing of value 'otherwise than as provided by law for the proper discharge of official duty.' On the face of the statute the two comparative clauses are not equivalents. Congress did not use the same language in defining criminal intent for the two offenses. 'Corruptly' bespeaks a higher degree of criminal knowledge and purpose than does 'otherwise than as provided by law for the

> proper discharge of official duty.' It appears entirely possible that a public official could accept a thing of value 'otherwise than as provided by law for the proper discharge of official duty," and at the same time not do it 'corruptly.' Congress obviously wished to prohibit public officials accepting things of value with either degree of criminal intent; it did so, but it legislated a difference in the requisite criminal intent and correspondingly in the penalties attached."[15]

The jury found, and its finding is not contested before us, that the bribe solicitation was here made with the requisite corrupt intent.

Section 201(c)(1), not § 201(g), is inapplicable to the facts of this case. Accordingly, the judgment of the district court is *affirmed*. It is so ordered.

AFFIRMED.

SWYGERT, *Circuit Judge*, dissenting. As blameworthy as the conduct of the defendants may be, in my opinion it simply does not constitute the commission of an offense as defined by section 201(c)(1). I would therefore reverse.

On August 26, 1975 defendant Arroyo, a loan officer with the Small Business Administration, recommended approval of Fernandez' application for an SBA approved loan. Arroyo's supervisor concurred in that recommendation on the same day. The loan application was then processed through usual channels and the money eventually paid to Fernandez.

On August 27 Arroyo's codefendant, Sanchez, talked to Fernandez and arranged for him to see Arroyo. Fernandez first met Arroyo on August 28, two days after Arroyo had recommended approval of the loan. Thus, Arroyo's authority to take official action with regard to the loan application had been exercised and terminated before any attempt was made by either Sanchez or Arroyo to solicit a bribe.

Two sections of the statute which deal with bribery, sections 201(b) and (c), are parallel provisions which prohibit the request for and giving of bribes. Two other sections, (f) and (g), also parallel provisions, cover the giving and receipt of gratuities. It is most important to distinguish properly between the bribery and gratuity sections, a distinction made in the statute but not in the majority's opinion. Although both types of activity are prohibited under the statute, bribery is clearly considered to be the more serious offense as evidenced by the difference in penalties.[1]

The bribery sections punish those who would substitute the wishes of an interested party for the "objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions." *United States* v. *Labovitz*, 251 F.2d 393, 394 (3d Cir. 1958). The purpose of these sections is therefore to prevent corruption of the decision-making process.

Section 201(b) may be violated even though the official was not corrupted by the offer, or the purpose of the

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[15] The disparity in penalties appears in the quotes at footnotes 1 and 6, *supra*. In addition to greater maximum periods of incarceration and fines, government officials convicted of violating section 201(c)(1) may be disqualified from further government employment.

[1] One convicted under section 201(b) or (c), the bribery sections, "[s]hall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States." One convicted under section 20(f) or (g), on the other hand, "[s]hall be fined not more than $10,000 or imprisoned for not more than two years, or both."

bribe was unattainable,[2] or even though there was actually no occasion to seek to influence an official's conduct.[3] In each case, however, the defendant must intend to influence the bribee. *Kemler* v. *United States,* 133 F.2d 235 (1st Cir. 1942). Similarly, a public official charged with violating section 201(c) must intend to corruptly solicit something of value *in return* for being influenced, that is, intend to permit himself to be influenced. *United States* v. *Irwin,* 354 F.2d 192, 195-96 (2d Cir. 1965), *cert. denied,* 383 U.S. 967 (1966).

In the case at bar, Arroyo's part in the decision-making process had already been completed at the time it was represented that a bribe might bring about a favorable decision. No evidence was introduced to show that Arroyo could in any way have altered or influenced the decision that had already been made. The matter was completely out of his hands. It therefore follows that he did not have the requisite intent necessary for a conviction under section 201(c).

In *Woelfel* v. *United States,* 237 F.2d 484, 488 (4th Cir. 1956), the Fourth Circuit held that where a federal government employee's request for a payment "was not made . . . until after [the employee] had exhausted his power of decision or action on the question or matter before him, and was not made under any prior promise or understanding that a gratuity would be forthcoming," the request did not constitute a violation of the bribery statute. I would follow the Fourth Circuit's holding in the present case.

Both Arroyo and Sanchez misrepresented, implicitly if not explicitly, that the decision on the loan application was still pending, but that misrepresentation was made to Fernandez *after* the application was approved. I em-

[2] *See e.g., United States* v. *Troop,* 235 F.2d 123 (7th Cir. 1956).

[3] *See, e.g., United States* v. *Labovitz,* 251 F.2d 393 (3d Cir. 1958).

phasize again that a bribery statute is designed to prevent official decisions made as a result of corrupt influence. Accordingly, when a public official represents to a prospective briber that a decision is still pending when in fact it has already been made, the misrepresentation takes on the character of fraudulent conduct, but it does not constitute solicitation of a bribe as defined by section 201(c)(1). The language of that section is plain and unambiguous. Its literal meaning ought not be expanded by interpretation as the majority has done, for it is a cardinal rule of statutory construction that a criminal statute must be strictly construed. *United States* v. *Wiltberger,* 18 U.S. (5 Wheat.) 76, 95-96 (1820).

Despite appearances, the defendants' conduct was actually solicitation and acceptance of a gratuity for an "official act performed," a transgression of 18 U.S.C. § 201(g). *See United States* v. *Brewster,* 506 F.2d 62 (D.C. Cir. 1974). Such conduct does not constitute a violation of section 201(c)(1).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
September 5, 1978
Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HOWARD T. MARKEY, *Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 77-2257

v.

ANTHONY ARROYO and FRANK SANCHEZ,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 353
JOHN F. GRADY, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants-appellants Anthony Arroyo and Frank Sanchez, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing.** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, denied.

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* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

** Judge Luther M. Swygert voted to grant a rehearing.